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# Nelda Crawford and David Beesley, Dha Beesley Monument & Vault Company v. City of Manti, A Municipal Corporation, Frank J. Garbe, Its Mayor, Margaret anderson, Ben Kjar, Lloyd R. Nielsen, Ray P. Cox and R. Morgan Dyreng, Its City Council, and Clarence Robert Hall, Its Sexton : Respondent's Brief

# In the Supreme Court of the State of Utah



NELDA CRAWFORD and DAVID BEESLEY, dba BEESLEY MONUMENT & VAULT COMPANY,

Plaintiffs-Respondent,

vs.

CITY OF MANTI, a Municipal Corporation, Frank J. Garbe, its Mayor, Margaret Anderson, Ben Kjar, Lloyd R. Nielsen, Ray P. Cox and R. Morgan Dyreng, its City Council, and Clarence Robert Hall, its Sexton,

Defendants--Appellants.

NO. 10,392

# RESPONDENT'S BRIEF

An Appeal from a Judgment of the District Court of Sanpete County, State of Utah
Honorable Henry Ruggeri, Judge

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## RESPONDENT'S BRIEF

### STATEMENT OF THE KIND OF CASE

This is an action for a Declaratory Judgment in which Nelda Crawford seeks to complete a memorial pattern of monuments existing in the Manti City Cemetery on cemetery lots owned by her, by establishing pillow type monu-

ments identical with those in the pattern at the head of her deceased husband's grave, as well as the right to have an identical one placed at the head of her grave upon her demise, despite the provisions of an Amended Manti City Ordinance requiring that all monuments established after its adoption must be flush with the surface of the ground. The trial court held that the Amended Ordinance was unreasonable insofar as it prevented the completion of the Crawford Memorial Pattern, and enjoined its enforcement against the cemetery lots. Defendants appealed from that judgment to this court.

## STATEMENT OF THE FACTS

With the exceptions hereinafter noted we believe that appellants' statement of facts fairly reflects the record before this court on this appeal. The exceptions are as follows:

We would modify statement No 4 on page 5 of appellants' brief to show that the memorial pattern consisted of the three pillow type monuments, and the large monument which was located at the west end of lots. The complaint alleged, the answer admitted and the court found that the Crawford family had arranged and established the memorial pattern in the Crawford lots prior to 1915 and there is no evidence in the record to the contrary (R. 1-5, 8-9).

We would supplement paragraph 5 of appellants' statement pertaining to the Edmund Crawford pillow type monument and the refusal to allow its installation by the city sexton, by setting forth testimony with respect thereto given at the trial by Beesley as follows:

"(A) Our workmen went down there and erected the monument and it was removed. And I went down and checked on it and found the sexton had removed the base part. We hadn't at that time put the top part on." (Tr. 9).

Beesley's testimony is that the sexton had removed the "base part" and this is the only evidence in the record concerning the removal. The court found that the sexton had "torn" the monument out and we believe Beesley's testimony supports it because it is difficult to see how the monument base could have been removed without being torn out.

Referring to the last paragraph of Statement No. 5 on page 6 of appellants' brief, we challenge the statement that "since October, 1948, there had been many similar requests by persons whose lots were in exactly the same condition as the Crawford lots." The witness, Hall, testified at length that after the amendment of the ordinance in question there had been many requests identical with that made by the plaintiff in this case and he listed on defendants' Exhibit 8 some eighteen claimed identical cases. On cross examination this witness was obliged to admit that there were only "Four. Four that I can recall." (Tr. 47). There is no evidence in this record of an identical case with the Crawford case because none of those mentioned by Hall claimed a "Memorial Monument Pattern" established long before the amendment in question was adopted by Manti City and which was sought to be continued and brought to a conclusion after the amendment was adopted. (Emphasis supplied).

Appellants summarize the testimony of the witnesses,

Hall and Nielsen, apparently for the purpose of showing the contents of the record respecting the reasons why Manti City adopted the aemndment in question on October 25, 1948 (App. Br. 7-10). These witnesses gave as the reasons why the amendment should be adopted, (1) "to save money for Manti", (2) "convenience for those who cared for the cemetery", (Tr. 42-43) and (3) "for esthetic considerations" (Tr. 52). As part of his cross-examination the witness Hall said:

> "Q. And the considerations that you had were purely from the point of view of the financial interests of the city and the convenience of the caretakers?
>
> A. That is right." (Tr. 43).
>
> "Q. You didn't consider the sentimental feelings of people who had established such monuments in the center of the block did you?
>
> A. Yes sir."
>
> "Q. Well, at any rate you let the financial considerations over-rule the feelings of the people?
>
> A. No. That was not the idea."
>
> "Q. Well, you did that.
>
> A. Well—"
>
> "Q. Didn't you?
>
> A. To that extent; yes." (Tr. 42).

On cross-examination Hall testified as to the esthetic reasons given by him as follows:

> "Q. You did not want to say, did you, that to allow a pattern established over the years to (be) interrupted about in its middle would be in accordance with esthetics, do you?
>
> A. Well, I couldn't see that it was adding or taking away from the beauty of the stones that was there. . ."

"Q. Now I show you Exhibit No. 1. Tha tshows the three stones. They look pretty good?

A. Yes."

"But you can see by looking at it that it is an esthetic blunder, can't you, to disallow the other graves to have the same kind of markers?

A. Well, I won't say that it is a blunder." (Tr. 54).

Although the reasons given for the adoption of the amendment by Manti City are of questionable relevance to the principal issue presented on this appeal, we refer to the record in order to show that they are specifically inapplicable to the Crawford cemetery lots. The witness, Hall, testified that Crawfords have always paid their perpetual care and have maintained same ever since it began in the Manti City Cemetery in 1936 (Tr. 55). Beesley testified (Tr. 10) "A. By putting a coping, a cement coping around the level with the grass out say seven to nine inches around each of the markers would give ample room for the lawn mower to cut the grass, and with the cement border around there would beautify and I think would improve the looks of the whole area."

The witness, Hall, admitted on cross-examination (Tr. 50) that Beesley's suggestion could eliminate any interference with cutting the lawns around the monument. Also Hall testified that the reason given for the passage of the amendment in order to keep the hoses from getting caught on the monuments has largely been eliminated since the sprinkler systems were installed at the cemetery (Tr. 42).

We shall hereinafter refer to Nelda Crawford as respondent.

## ARGUMENT

### POINT I

APPELLANTS' ARGUMENT IS IN PART SEMANTIC; DOES NOT FULLY SET FORTH THE LAW; AND ERRONEOUSLY ATTRIBUTES AS "JUDICIAL LEGISLATION", THE JUDICIAL FUNCTION PROPERLY EXERCISED BY THE TRIAL COURT.

We desire to comment briefly on the points made in appellants' argument.

Point I is largely a question of semantics, appellants claiming that the words "tore out the installation" as found by the court, is not supported by the testimony of Beesley that the "sexton had removed the base part". It is difficult to see how the base part of the monument could be removed without it being torn out, and consequently we think the finding is supported. However, the essential facts in this regard are admitted, i.e., that the monument plaintiff had installed was removed and defendants refused to allow it to be constructed because of the amended ordinance.

Point 2 (A) and (B) do present the essential question of law presented on this appeal which we shall answer in our argument.

Apparently appellants felt no need of arguing Point 3.

Point 4 is not a fair and full statement of the law applicable in the situation set forth herein, because it lacks the concluding part of the rule referred to, namely that cemetery regulations must be reasonable in their application. (Emphasis supplied).

Point 5 embodies an untenable argument because the trial court did not over-rule the action of the City Council, bu it found, concluded, and held that an amendment to an ordinance passed by the City Council was not applicable to the respondents' cemetery lots because it unreasonably denied an existing right of respondent.

The principal question presented by this appeal involves the validity of the amended ordinance in question and the issues in this connection are two-fold:

(1) Does the amended ordinance in question impair the property rights of the respondent by interrupting the long established monument pattern in the cemetery lots in question under the guise of regulation? and,

(2) Is the amended ordinance arbitrary, unreasonable or capricious as a regulation of respondent's cemetery lots in which a monument pattern had long prior thereto been established?

Appellants seem to have correctly understood plaintiffs' theory of the case as indicated at the top of page 12 of their brief, but our argument is not reflected by what is there said. The argument is, that the Crawford family established monuments in its cemetery lots forming a memorial pattern which was 4/6ths complete in 1915, and its completion required only the addition of the remaining 2/6ths of same. This was admitted by the evidence, was found by the court and became the basis of the judgment. While the monuments large and small themselves consisted of individual stones, yet the memorial pattern which they constituted became and remain an entity in and of itself even though unfinished. When respondent acquired the cemetery lots she succeeded to the rights which had

vested in the memorial pattern, nearly completed, but then unfinished. Appellants must agree with us that the amended ordinance in question could not require respondent to remove any of the monuments which constituted the pattern in question for the reason that they stood above the surface of the ground. That being true neither could the amended ordinance strike down the memorial pattern made up of the monuments. The trial court adopted respondent's theory and rightly found and determined that the amended ordinance could not reasonably prevent the completion of the monument pattern. Appellants' reference to seven "good men and true" has no relevance to what the court found under the evidence in this case. The record does not sustain appellants' statement that "there were 18 additional plots in exactly the same state as the Crawford lots with respect to monuments and markers installed and in contemplation". The fact is that nowhere in this record is there any evidence of a situation identical with the Crawford lots in that in no other situation was there any evidence of the establishment of a "monument memorial pattern" which was pursued and in existence long before the amended ordinance in question was adopted.

## POINT II

THE AMENDED ORDINANCE IN QUESTION:

(a) IMPAIRS THE PROPERTY RIGHTS OF RESPONDENT BY INTERRUPTING A LONG ESTABLISHED MONUMENT PATTERN IN THE CEMETERY LOTS IN QUESTION UNDER THE GUISE OF REGULATION, AND

(b) THE AMENDED ORDINANCE IS ARBITRARY, UNREASONABLE AND CAPRICIOUS AS A REGULATION OF RESPONDENT'S CEMETERY LOTS IN WHICH A MONUMENT PATTERN HAD BEEN LONG ESTABLISHED.

The Findngs, Conclusions and Judgment of the Trial Court are preponderantly supported by the evidence in this case, and same should be affirmed by this court because same are in accordance with law.

There is no question but that Manti City has the powe rconferred on it by statute as a City of the third class to purchase, operate, and make rules for its cemetery. Section 10-8-62, **U.C.A. 1953.** This we admitted at the trial and at no time have be contended otherwise.

The general rule of law applicable to the instant case is stated in 14 **CJS** Secton 3, p. 66, as follows:

> "When expressly so authorized, a municipality may own and maintain cemeteries. It may exercise general control over a cemetery owned by it, but must not exercise and control t in an arbitrary, unreasonable, or capricious manner."

It is our position that the amended ordinance (1) unreasonably attempts to put an end to the monument pattern in the Crawfod lots, and (2) that the ordinance in making such attempt would destroy the vested right of respondent in the memorial pattern and would be void and of no effect.

A leading case supporing the foregoing general rule and particularly that portion of same which requires the exercise of the city's control and regulation of cemeteries

be reasonably, is **Mansker v. City of Astoria,** 100 Or. 435, 198 Pac. 199. The cemetery in that case consisted of an old section not subject to perpetual maintenance and a new section which was being subjected to perpetual maintenance under a regulation known as the endowment plan adopted by the Cemetery Commission. When an attempt was made to apply this regulation to rspondent's lot in the old cemetery it was resisted and this lawsuit resulted. The question arose in the case as to whether or not the city could force the owner of the old cemetery lot purchased a long time before the adoption of the new endowment plan to pay an assessment in the amount of $77.45 made by the Cemetery Commission against the old cemetery lot owners along with the owners of lots in the new cemetery and at the same rate. The court discussed the reasonableness of the regulation as it applied to the lot owners in the new secton of the cemetery and held that the regulation was reasonable as it affected the owners in the new cemetery, then said "but quite a different question is presented when we come to consider the authority of the Commission to apply the endowmnt plan to lots which were sold before the endowment plan was adopted." At page 204 of 198 Pac. the court further staed that:

> "The concrete question for decision is: Can the Commission by compulsion bring within the embrace of the endowment plan all lots which were sold prior to the adoption of the plan?"

This court considers the nature of the conveyance by a city of a cemetery lot, and also the power of the city, even by the exercise of its "police power" to abrogate rights which have vested by reason of such conveyances prior to

the regulatory measure. Appellants in their brief argue that the conveyance to Crawford carried with it only the right of burial and was subject to any changes the city might thereafter make, and also that the city had a right under its "police power" to interfere with rights which accrued to Crawfords before the amended ordinance in question was adopted. The Oregon court in the **Mansker case, Supra,** has resolved these questions against appellants' contentions and we quote its language from pages 205-6 of the Pacific Reporter:

"A conveyance of a cemetery lot as a place of burial for the dead does not vest the grantee with fee-simple title in the lot ,but gives rights analogous to an easement or a privilege; the rght of burial being a privilege or license to be enjoyed so long as the place continues to be a burial ground subject to municipal regulation and conrol and legally revokable whenever the public interest requires."

"The privilege or license created by the conveyance, in the absence of express restrictons made at the time, include more than the mere naked right of depositing a dead body in the ground; for with the right of interment are included the right to do so according to the usual custom in the neighborhood, the right to make mounds, and the right to erect stones and monuments at the graves . A cemetery is not only a place where the living may bury their dead, but it is also a place where they may express their affection and respect for those dead by marking and decorating the place of interment."

"The circumstances are not such as to make the attempted action of the cemetery commission a lawful exercise of the police power, broad though the scope

of the police power is. Nor can the city say that the right to compel the application of the endowment plan was reserved to the city at the time of the conveyance of the lot to the plaintiff. The city is without power to bring the plaintiff's lot within the embrace of the endowment plan, unless the plaintiff consents."

"The court on appeal affirmed the decision of the lower court in favor of plaintiff and enjoined permanently the enforcement of the ordinance."

The principle of the **Mansker** case was applied in a recent Oregon case, **Shaefer v. West Lawn Memorial Cemetery** (1960) 222 Or. 241, 352 Pac 2d 744, where it was held that the regulation requiring monuments to be flush with the surface of the ground was reasonable as to the new section of the cemetery in question but not as to the old section.

At this point we call attention to the **Manti City Ordinances,** Sections 180 and 181 of the compilation of 1941. Before the amendment in question the old part of the cemetery, including the part in which the Crawford lots are located, was not subjected to the regulation requiring monuments to be flush with the surface of the ground, but the new section was. It was not until the amendment of October 25, 1948, was adopted that an attempt was made to apply this regulation to the old part of the cemetery where there existed monuments that were not flush with the surface of the ground and which rose above it. In so doing Manti City has attempted to abrogate the vested rights of respondent in the said memorial pattrn, which had long existed in the old cemetery, and the trial court so held

and its decision is supported not only by the facts but by he law which we have hereinabove discussed.

The above mentioned rule of reasonableness was applied to attempted regulations by municipalities and the attempted regulatory measures were struck down because unreasonable, arbitrary or capricious, and we cite a few of the cases as follows:

**Chariton Cemetery Company v. Charlton Granite Works,** 197 Iowa 403, 197 NW 457, 32 ALR 1401. (Rule providing that the work of improving lots and the construction foundations for monuments, should be done only by employees of the company declared unreasonable and void).

**Rector . . . St. Paul's Church, Milwaukee v. Blackburn** (Wis. 1939), 230 Wis. 570, 284 NW 491 (Lot purchased without perpetual care—later attempt to subject lot to perpetual care held not an exercise of police power and ordinance struck down.)

**Scott v. Lakewood Cemetery Assoc.** (Minn. 1926) 167 Minn. 223, 208 NW 811 (Rules excluding florists without superintendent permission from cemetery, and providing cemetery association exclusively should thatch graves at specified presses, held unreasonable and void as to lot purchased prior to adoption of rules).

**Ignatowski v. St Mary's Polish Catholic Cemetery Co. et al.** (1953 Pa.) 174 Pa. Super. 62, 98 Alantic 2d 234. (Regulation requiring interment in concrete vault provided by cemetery held unreasonable and void).

**Steele v. Rosehill Cemetery Co.** (Ill. 1938) 370 Ill. 405, 19 NE 2d 189 (held unreasonable to attmpt change by rule of cemetery vested rights in cemetery lots purchased prior to amendment raising the price of perpetual care).

**Sliver v. Greenmount Cemetery Co.** (Pa. 1949) 164 Pa Super 534, 67 Atlantic 2d 584 (Unreasonable to subject cemetery lot to perpetual care by ordinance adopted subsequent to purchase of the lot).

## SUMMARY AND CONCLUSION

It is our position that the respondent has a vested right to have the pattern of monuments established and carride out prior to the adoption of the Manti Ordinances of 1941 and the amendment thereto made in 1948, continued and completed so that a like pillow type monument could be placed at the head of her deceased husband's grave, and provision for an identical monument to be placed at the head of her burial place beside that of her husband. We believe that the law above referred to sustains the respondent's right in the premises, and that the amended ordinance in its attempt to abrogate same is unreasonable in that it would deprive respondent of long established vested rights in the premises. The Findings, Conclusions and Judgment holding plaintiff entitled to these rights made by the Trial Court is amply sustained by the evidence and are in accordance with the law and should be affirmed.

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